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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JACK WALTERS & SONS CORPORATION,

Petitioner,

vs.

MORTON BUILDINGS, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

RICKARD T. O'NEIL
Counsel of Record
SUSAN R. ROBERTSON
MICHAEL, BEST & FRIEDRICH
250 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
(414) 271-6560

MYRON L. CAUBLE, JR.
5415 North Idlewild Avenue
Milwaukee, Wisconsin 53217
(414) 332-9542
Attorneys for Respondent
Morton Buildings, Inc.

Pandick Midwest, Inc., Chicago • 454-7600

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QUESTIONS PRESENTED FOR REVIEW

Morton Buildings, Inc., sold Morton Building packages to Walters who, as a dealer in Morton Buildings, resold and erected such buildings. Morton also had its own Sales Offices through which it sold and erected such buildings.

1. Is the name Morton Building a product separate from the building package produced and sold by Morton Buildings, Inc. when that name identifies that building package and has never been sold or marketed separately from that building package?
2. Does Walters, who believed he would encounter customer resentment if he did not sell the Morton Building at the price advertised by Morton Buildings, Inc. to the public, have a compensable antitrust injury?
3. Was the dismissal of an "aggregation of restraints" claim consisting of tying, resale price maintenance, and territorial restrictions correct when the first two were not unlawful and the third was left for trial?

THE PARTIES

The caption of the case contains the name of all parties. Morton Buildings, Inc., has no parent, subsidiary, or affiliated corporations.

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Opinion Below

Jack Walters & Sons, Corp. v. *Morton Buildings, Inc.*, 737 F.2d 698 (7th Cir. 1984)

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Statement of the Case

Basis for the Petition

The petitioner Jack Walters & Sons Corporation (hereafter "Walters") seeks review by petition for certiorari of the decision by the United States Court of Appeals for the Seventh Circuit in the case of *Jack Walters & Sons Corporation v. Morton Buildings, Inc.*, 737 F.2d 698 (7th Cir. 1984).

Although nowhere specified in its petition, the only apparent basis upon which Walters seeks review is that the Seventh Circuit decision conflicts with applicable decisions of this Court and, accordingly, that the petition should be granted under Rule 17.1(c) of the United States Supreme Court Rules.

Respondent Morton Buildings, Inc. ("Morton") contends that the Seventh Circuit did not disregard applicable precedent, but faithfully adhered to the decisions of this Court, properly applied them in a manner consistent with other circuits to the undisputed facts of record, and properly affirmed the trial court's dismissal of three of Walters' antitrust claims. (The Seventh Circuit also affirmed the dismissal of a fourth claim which arose solely under state law and is not, therefore, an appropriate subject for review in this Court.)

Statement of Facts

The following statement of facts is, with minor variations, identical to that stated in Morton's Brief to the Seventh Circuit, but it omits references to the record. It does contain references to Appendices A and B filed by Morton with this Brief in Opposition.

The Parties

Defendant Morton Buildings, Inc. ("Morton") is headquartered in Morton, Illinois. (Amended Complaint, ¶ 2, App. A-1 to A-2). It markets and sells under the Morton name, trademark, and logos materials, parts, and components which are assembled as complete buildings primarily for use by farmers. (Amended Complaint, ¶ 7, App. A-3). Prior to 1978, plaintiff Jack Walters & Sons Corp. ("Walters") was a Wisconsin dealer in Morton Buildings. (Amended Complaint, ¶ 9 & ¶ 12, App. A-3 to A-5). Walters purchased Morton Buildings from Morton and resold them to farmers and other customers. (Amended Complaint ¶ 12, App. A-4 to A-5).

Some of the prominent names in this case are Henry Getz, president and a principal of defendant Morton Buildings, Inc.; Jack Walters, president and founder of the plaintiff Jack Walters and Sons Corp.; and his sons James (Jim) and William (Bill) Walters, principals of the plaintiff.

Morton has several manufacturing plants. The first one is located in Morton, Illinois, where the company's offices are located. It has established other manufacturing plants at Spencer, Iowa; Kenton, Ohio; Winfield, Kansas; and Goodfield, Illinois. (Getz 1978 Aff. Exh. A-1, App. B-12).

Original Use of the name "Morton Buildings"

In 1949 while he was working for Interlocking Fence Company (now known as Morton Building Inc.) Henry Getz was looking for a product and came up with the idea of a packaged farm building which would combine steel with a wood frame. In that year packaged farm buildings were added to Interlocking's product line. Later, packaged farm buildings of the pole type were added.

By 1953, Interlocking was offering a building package known as a Morton Building consisting of all the material (except for foundation materials) for a laminated arch building. (Getz Ex. 28, Interlocking Golden Anniversary Catalog, p. 37, App. B-1 and B-4). The name "Morton Building" was used by Interlocking at least as early as 1953, first to describe Interlocking's laminated arch building package and later, around 1957, to describe its pole building package.

Since at least 1960, Morton has marketed and sold, under the Morton name, trademarks and logos, materials, parts and components which are assembled as complete buildings for farm, commercial and industrial use ("Morton Buildings"). The ultimate purchasers of said buildings are usually farmers; said buildings are normally used, *e.g.*, for storage or animal shelter. (Amended Complaint, ¶ 7, App. A-3).

Catalogs and flyers from the '50's and early '60's show trucks loaded with Morton Building packages bearing signs stating "Another Morton Building—Interlocking Fence Company, Morton, Illinois." (Getz Ex. 28, Interlocking Golden Anniversary Catalog, p.37, App. B-4). These early catalogs and flyers also contained statements from owners that they had built their own Morton Building. (Getz Ex. 28, Interlocking

Golden Anniversary Catalog, p.36, App. B-3). Such buildings were advertised as easily erected. (*Id.* p. 35, App. B-2). During that time, the buildings were actually erected by the owner, by a contractor hired by the owner, or by a local contractor hired by Interlocking. In the early 1960's the Morton Building package was advertised for sale as either erected or for customer erection. (See, *e.g.*, Getz. Ex. 29, 1961 Interlocking Fence Supply Catalog, p. 48, App. B-10).

Interlocking changed its name to Morton Buildings, Inc. around 1965. Prior to 1965 no enterprise, not even the defendant, used the name Morton Buildings to describe itself. That name was applied to the building package sold by Interlocking Fence Co.

The Morton Building

At all its plants, except Goodfield, Illinois, Morton manufactures, assembles, and ships a pre-packaged post-frame building which is a pre-packaged group of components and materials that is ultimately built and assembled in the field. A post-frame building is one which uses posts (instead of poles) as the main vertical support. The posts in a Morton Building are made of wood and have a square shape (6″ x 6″) when viewed from the end. The posts are sunk into the ground and anchored in a concrete mix (called "sacrete") which has been poured dry into the hole and which absorbs ground moisture to harden. There need not be any other foundation for the building nor need there be any floor. Because they are to be sunk into the ground, the square posts are specially treated with a preservative and inspected. The exterior sides and roof of the building are made of pieces of steel sheet cut to custom lengths and then rolled and ribbed by Morton according to its own exclusive design. Trusses, which are triangles constructed of various pieces of lumber and manufactured by Morton, are secured at their ends to the tops of the posts and span the interior of the structure. Trusses are the main support for the roof. Pieces of lumber, known as side nailers (2 x 6's), are nailed horizontally to the

exterior surfaces of the vertical posts. Pieces of lumber, known as purlins (2 x 4's), are nailed across (at right angles to) the trusses. The steel siding and roof is then nailed to the side nailers and to the purlins and thus the roof and siding are secured to the building. The building is also trimmed with steel. Boards (2 x 8's) known as "splashboards" are also secured along the lower portions of the interior to protect the steel from splashes, dents, or other possible harm from within the building. Splashboards are also treated with a preservative. Other lumber, generally of common dimensions, such as 2 x 4's or 2 x 6's, are used for various auxiliary and strengthening purposes, such as bracing the trusses ("knee braces and truss ties"), the corners ("corner braces"), and the doors ("door braces"). In addition to the above items, Morton Buildings have hardware and may have large sliding doors (made of the same steel as the siding and roofing). A Morton Building could also have, if ordered by the customer, smaller doors called walk doors, overhead doors (i.e., garage type), and even windows, skylights, or insulation.

Standard buildings were listed in the Morton computer with a prepared material list. Farmers, who are the primary customers, have options that vary from the standard building. Some of the options are sizes and locations of doors and windows. Other options are available both in the exterior and interior. Basically, however, all Morton buildings stem from the basic building.

In fact, during the period 1974-1978, according to Walters' accounting expert witness, i.e., Arthur Andersen & Co., the proportions of various materials did not vary much from building to building. For all buildings purchased by Walters from Morton, the percentages of the following materials within the buildings remained fairly constant: steel siding, roofing, and trim (43.3%); pre-cut lumber (*e.g.*, trusses) (21.7%); dimension lumber (*e.g.*, purlins and nailers) (16.5%); treated lumber (*e.g.*, square posts and splashboards) (13.8%); and the other

items (*e.g.*, windows, doors, nails, insulations, hardware, and sacrete) (4.7%).

The Morton Building Package

The Morton Building package is physically different from delivery of separate components. Walters would receive, usually at the jobsite, a flatbed truck loaded with the components necessary to erect a building.[1] Primarily, Walters sold buildings as package buildings and buildings were, with very few exceptions, ordered from Morton as package buildings.

Although some erectors of farm buildings do purchase truckloads of individual components from suppliers (*e.g.*, a truckload of trusses or a truckload of windows) and then sort out the material and erect the building, others purchase complete building packages (*e.g.*, a truckload with the materials needed for a particular job) from suppliers who provide the package option. For a builder there are definite advantages to the package purchase, *i.e.*, having the entire package delivered by truck to the jobsite. A builder would be willing to pay a premium to avoid the necessity of preparing such packages on his own. A former independent dealer for Walters indicated he was willing to pay a 5% premium for a building package.

By the mid-fifties, Interlocking was manufacturing flashings, trusses, steel, and some hardware for its building.

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[1] After termination Walters purchased truckloads of components rather than purchasing building packages. It would take delivery, for example, of a truckload of doors or a truckload of lumber, etc., at its Allenton, Wisconsin office. It would then reload these materials onto flatbed trucks in such a manner that all the components necessary to deliver what Walters' employees called a "total building" would be on one truck (unless the building is so large as to require more than one flatbed, in which case several trucks would be used). Walters' Corporate Procedures Manual, p. 16, which instructs its own sales offices as to how to order a "Walters Building" for delivery to the jobsite and Walters' sales brochure shows a Walters' load with "Another Walters Building" sign.

Since at least 1953, the Morton Building package has included all the materials for the basic building shell and structure. By 1953, Interlocking furnished all materials (except the foundation) for the Morton Building, then of the laminated arch design. In 1957, Interlocking introduced its pole frame building version of the Morton Building package. This package also included all the materials for the basic building shell and structure, i.e., primary and secondary framing (poles, trusses, nailers, purlins, bracers, headers and truss ties), exterior covering (siding, roofing, and trim, then made of wood), hardware and nails. (The inclusion of these items made the Morton Building package similar to what is recognized in the metal building industry as a "metal building system".) If the plan for the building called for it, the package included insulation, windows, and doors. If the customer desired doors or windows which were not called for in the plans, those doors and windows could be ordered from Interlocking, provided the desired doors and windows were of a type for which there was sufficient demand to include them in the price list.

In 1961 and 1962 Interlocking was advertising "Complete materials, plans, and erection instructions are included" for Morton Buildings. (See, *e.g.*, Getz Ex. 29, 1961 Interlocking Farm Supply Catalog, p. 48, App. B-10).

Producing the Morton Building Package

Morton purchases lumber and coils of sheet steel from various suppliers. At its plants Morton manufactures the trusses; cuts and roll-forms the steel sheet into custom lengths of its exclusive design (known as "Morton Hi-Rib") for the roof, the siding, and large sliding doors; forms the same sheet into metal trim items; and cuts lumber for some braces and some door frames. [According to Walters' accounting expert, the direct cost to Morton of these items (*i.e.*, steel and trim (43.3%) and pre-cut lumber including trusses (21.7%)) represents 65% of Morton's total direct cost for the package. Direct cost here

includes only cost of material, direct labor, and freight to Morton's plant.]

The Morton Hi-Rib steel sheet was developed and introduced by Interlocking in the 1950's. It was designed to be superior in preventing leaks and was produced by Interlocking with its own roll-forming machine. This was an innovation in pole frame buildings and even today only one or two other competitors roll-form their steel siding and roofing. The Hi-Rib design is still used only on Morton Buildings. Colored steel on the Morton Building was introduced by Interlocking around 1959. Interlocking was the first to use colored steel on a wood frame building, although others have followed.

Morton also regularly purchases from selected suppliers, and inventories, items which are included in the building package. Among such items are nailers and purlins and other dimension lumber. (Dimension lumber represents 16.5% of Morton's direct cost of the package.) Also among such items are the square posts and splashboards. This lumber is specially treated with a preservative. (Treated lumber represents 13.8% of Morton's direct cost of the package.)

Square posts were introduced by Interlocking around 1958 in an attempt to obtain straight, well-aligned sides similar to those of steel frame buildings and to provide more nailing surface and thus stronger connection with other parts. The purpose of preserving the posts is to make Morton's posts last longer. While some others have followed Morton's retention standard, Morton has always attempted to treat its posts with more preservative than the competition and to make a greater effort at inspection. Posts are also anchored in concrete rather than rested on a pad. This is intended to prevent lifting by wind.

Also included in the package are nails and hardware. Morton also regularly inventories certain other items which may be added to, or substituted within, the package, *e.g.*,

certain brands and sizes of overhead (garage type) and walk doors, skylights, and insulation. (These last items plus the nails, hardware, and sacrete represent 4.7% of Morton's total direct cost of the package.) Some of these last items are manufactured by Morton, at its Goodfield plant. These manufactured items include sheet metal items, plates for trusses, and certain hardware. At Goodfield, Morton also welds and does fabricating on steel beams for overhead door headers. The balance of this category is purchased elsewhere.

Although the items within this last ("Other") category represent only 4.7% of Morton's direct cost of the building package, Morton has worked with suppliers to improve the quality of these materials and to improve their fit within the building. These efforts have included attempts to develop overhead doors specially designed to fit Morton Buildings and to develop better insulation. One of the major purposes of all of Morton's design changes over the years has been to simplify the erection process and to make the entire package fit better.

The Contents of the Building Package

"The business of Walters as a Morton dealer consists of selling Morton Buildings to farmers and other customers, and then purchasing from Morton all of the materials and components required to construct the building". "Walters' business also involves ordering all of the components required for a customer's building from Morton and then, with its crews, erecting the customer's building on its premises from the components in accordance with directions and instructions which Morton has conveyed to Walters over the years." (Amend. Complaint ¶ 12, App. A-4 to A-5). The package would generally include all the materials necessary to erect a Morton Building and Jack Walters testified that Walters purchased all of its materials from Morton. When a farmer erected the building himself, he received a complete package for a standard building or whatever type of building was ordered.

In response to a particular order received at one of the plants, the materials necessary to erect the basic structure and shell of the particular Morton Building ordered by the farmer or other ultimate user are loaded onto one or more trucks and shipped to the erection site. These materials included the correct amount or number of nails; posts; side nailers and purlins; Morton Hi-Rib steel, cut into custom lengths for the siding, roof, and sliding doors (unless different doors were ordered and available from Morton); trusses; hardware; insulation, if ordered and of a type inventoried by Morton; Morton signs or logos; plus a material list and plans for erection and any other materials necessary to erect the basic structure and shell of the particular Morton Building.

Although Morton generally attempted to sell a package for a complete building,[2] there were certain nontypical buildings for which Morton did not supply all components. There were two story dairy barns, some commercial buildings, and stud type (not pole) confinement buildings for which Morton did not supply all the materials. The two-story dairy barn was "non-typical" and Walters sold few stud type confinement buildings. In 1977 all types of commercial and confinement buildings (stud and pole) represented only 8% and 2%, respectively, of all buildings Walters sold. In the cases of these buildings, Walters obtained the necessary remaining components from other sources, such as subcontractors selected by Walters or by the customer or from other suppliers of equipment or material. The customer himself may have obtained the additional components.

In sum Walters bought a basic shell from Morton and on occasion purchased from other sources certain "collateral items" which were not a part of the "system package".[3] The

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[2] Even Walters' counsel admitted at oral argument in the district court that the package was in many instances complete and Walters'

(Footnote continued on following page)

portions of the basic shell or "building system" which Walters would have to purchase from outside sources for such buildings were limited.[4]

Sales Offices and Dealers

In the early 1960's, Interlocking Fence also began establishing its own retail sales outlets, or sales offices. The number of sales offices increased from the early 1960's until in 1978 the total number of Morton Buildings, Inc. sales offices was approximately seventy-one.

Interlocking was also approached by several individuals or small companies, such as Jack Walters, who requested that they be made dealers in Morton Buildings. Morton never sought any dealers; each approached it and asked to resell the buildings. The maximum number of dealers Morton ever had was six. That number declined until, in mid-1977, Walters was the only remaining dealer.

Jack Walters himself first learned of Morton Buildings in 1962 from a farmer who had erected his own building which was called a "Morton Building" and which probably bore a

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(Footnote continued from preceding page)

expert's report shows that Walters purchased all materials for machine sheds from Morton.

[3] Collateral items included slabs, concrete materials, plate glass windows (if not furnished preglazed), masonry fronts, overhead doors, animal equipment (*e.g.*, hog crates, nipple waterers, heat makeup units, heater units), plumbing, electrical, and interior materials. These "collateral" items would not be part of the "typical" pole building as described in Walters' briefs below.

[4] For the dairy barn such purchases would include thermopane windows, some air vents, pneumatically controlled cow doors, and a walk door. For a commercial building they would include some fire treated wood, some walk doors, some plate glass windows and entrance covers; some commercial trusses, before 1976 or 1977, for state or local code requirements; and perhaps 6 x 8 posts for commercial buildings although they were available through Morton on a special order basis.

"Morton" sign. Jack asked Henry Getz, President of Interlocking Fence, about selling such buildings in Wisconsin and became a dealer.

Morton-Walters Operating Procedure

Before ordering a building Walters would contract with its own customer to sell a Morton building. (Amended Complaint, ¶ 12, App. A-4 to A-5.) Buildings were primarily sold as packages. Walters would then order the building package from Morton. Morton would ship the building package in one or more truckloads directly to Walters' customer's jobsite where it would be erected.

The procedure for the ordering and shipping of a Morton Building was described in The Morton Corporate Procedures Manual, which was distributed both to Morton's Sales Offices and to its dealers. The manual referred to the component packages as "Morton Buildings" and detailed how to order "Morton Buildings".[5] Included in such instructions were directions on how to schedule delivery of "buildings", which terminology referred to the material packages shipped to Walters.

A "very typical" order submitted by Walters to Morton would state the *building* series and model number, dimensions of the buildings, and the color. In an abbreviated form, the order specified all the material for the particular building ordered and it would also specify any doors, skylights, etc.

Walters would usually receive from Morton an acknowledgement of its order. Walters would then inform its customer of the scheduled building delivery date. From 1975 until termination, Walters mailed a certain form to inform its customers of the delivery date. This form read in part: "This is

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[5] After termination, Walters had a parallel practice of selling packages to its own independent dealers which packages were invoiced as a "JWS building" and which included all the components necessary to erect the basic shell.

just a reminder that your *Morton Building* is scheduled for delivery on *(blank)* ." [Emphasis added].

Originally, once at the jobsite, the buildings were erected by the owners or by a local contractor, sometimes called a subcontractor. Later, buildings were erected by crews consisting of a foreman and several other members, all of whom were employees of Jack Walters and Sons. Buildings are still erected by owners. Packages for buildings to be erected by customers include Morton signs. Of course, owner erected Morton Buildings were sold by Walters and were the same Morton Building packages which Walters had purchased from Morton and which was still called "A Morton Building".

Increasing Costs

Through at least 1974 Walters was content with purchasing the Morton Building package from Morton. In 1974, however, Morton made practically no profit at the manufacturing level and all its profit came from its own sales offices. To achieve a better balance between manufacturing profit and sales office profit, Morton, in 1975, increased the wholesale price which it charged to its own sales offices and to its dealers.

It did this by increasing its prices on the building package. But then between 1975 and 1978 the cost of material used in Morton Buildings escalated rapidly. These cost increases were in part passed on in the form of higher wholesale prices to Morton's sales offices and to dealers including Walters. Since only part of the material cost increases were passed on through higher wholesale prices charged by Morton, during this period Morton again suffered a decline in its gross margin. Morton's 1975 price increase returned Morton's gross margin closer to its 1971 level, but after 1975 Morton's gross margin declined again. At the same time as Walters was suffering a retail gross margin squeeze, Morton was also being squeezed by its suppliers. By 1978 Morton's margin was 22.9% and thus had virtually returned to the 1974 margin level of 22.2%.

Morton's actual gross margins on all charges to Walters for the years 1971-78 are set forth below.

1971	1972	1973	1974	1975	1976	1977	1978
25.7%	24.0	19.5	22.2	27.1	25.4	24.3	22.9

The 1974-78 figures are based upon Walters' accounting expert's report.

The Walters Building

Walters' dealership was not consistently profitable. It experienced a loss about once every three years even before Morton's alleged decision to make Walters unprofitable. During 1977, Walters again experienced a loss, this time of $121,200.

In June, July, or August of 1977 Walters considered the costs of the alternative of manufacturing its own building. In August or September of 1977 Walters had discussions with banks over loan applications to secure funds for the production of Walters Buildings.

On October 14, 1977 Walters had a meeting with Henry Getz, president of Morton. In that meeting, Walters indicated a desire to purchase from other sources certain parts of the Morton Building package (*i.e.*, some items which were not manufactured by Morton). At no time did Walters request permission to purchase manufactured items, such as steel, trim, trusses, and other precut lumber from other sources.[6] Walters was satisfied with Morton's steel prices until November or December, 1977.

On October 28, 1977 Walters received its first approval of a loan for construction of a manufacturing plant. In a letter to Morton on January 9, 1978 Walters stated that it intended to manufacture its own building.

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[6] The cost of these items represents about two-thirds of Morton's direct cost of the package. (See discussion, *supra*).

Termination

Simultaneously with introducing its own building, Walters raised its authorized selling price for the Morton Building to 14% above the Morton suggested selling price and introduced its own Walters Building at the Morton suggested selling price. As a result, between Jan. 9, 1978 and Feb. 17, 1978, Walters sold only one Morton Building and forty-two Walters Buildings.

On February 17, 1978, Morton informed Walters it would be terminated, effective June 1, 1978, based upon Morton's understanding that Walters was representing its buildings to be of better quality than Morton's and was offering the Walters Building at a lower price. On March 23, 1978 Walters expressly instructed its salesmen "Effective March 23 we will not offer the Morton Building for sale".

Post-Termination

In its first year of manufacturing and selling its own building package Walters realized an immediate profit by selling the Walters Building instead of the Morton Building. For the 12 months ending February, 1979 Walters had a pre-tax earning of $262,800.

SUMMARY OF ARGUMENT

Walters' petition for certiorari fails to set forth with specificity the grounds for Walters' contention that this case merits Supreme Court review.

Tying: Walters contends that the Seventh Circuit failed to follow this Court's decision in *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 104 S.Ct. 1551 (1984), and to consider whether separate markets exist for the Morton name and the product which the name identifies, i.e. the Morton Building. A review of the Seventh Circuit's decision shows, however, that it did consider *Jefferson Parish;* it also considered and applied several

lower court trademark tying decisions which were referenced in *Jefferson Parish;* and it concluded, based on its application of those cases to the undisputed facts in the record, that a separate market does *not* exist for the Morton trademark and, consequently, that there is no unlawful tie-in of that trademark to the product which the trademark identifies.

Resale price fixing: Walters argues that the Seventh Circuit's decision violates this Court's holding in *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), but, as even Walters' petition notes, the Seventh Circuit did not disregard *Albrecht.* Walters conceded that Morton may lawfully advertise retail prices to consumers and one of Walters' principals testified that Walters felt compelled by pressure from its customers to meet those prices. Based on those concessions the Seventh Circuit properly concluded that Walters suffered no compensable antitrust injury in this case, regardless of any other means which were allegedly employed by Morton to obtain adherence to the advertised prices.

Aggregation of restraints: The term "aggregation of restraints" sheds no light on the antitrust issues. The Seventh Circuit decision does not conflict with any opinion of this Court. The Seventh Circuit rejected two of the three elements of the alleged aggregation; the third remains for trial. The Seventh Circuit even reviewed the aggregation claim under the broad, classic common law definition of a conspiracy and found nothing improper. Walters' aggregation claim is also fatally flawed in its conception of an antitrust conspiracy. The alleged co-conspirators did not have the conscious commitment to a common scheme to harm competition or to eliminate Walters as a dealer or competitor.

ARGUMENT

I.

THE SEVENTH CIRCUIT PROPERLY APPLIED JEFFERSON PARISH TO CONCLUDE THAT MORTON'S NAME IS NOT A SEPARATE PRODUCT FROM THE BUILDING IT IDENTIFIES.

Walters' complaint that the Seventh Circuit failed to follow the teachings of *Jefferson Parish Hospital District No. 2 v. Hyde*, 104 S.Ct. 1551 (1984), is, in reality, nothing more than a disagreement with the Seventh Circuit's application of the principles of *Jefferson Parish* to the extensive record submitted with the summary judgment motion.

Furthermore, the contention that the Seventh Circuit ignored *Jefferson Parish* is incorrect. The Seventh Circuit granted Walters' motion to file a Supplemental Memorandum dealing with the application of *Jefferson Parish* to this case. Also the Seventh Circuit, at 737 F.2d 704-705, did exactly what this Court did in *Jefferson Parish* at 1563, *i.e.* it reviewed prior lower court decisions such as *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971) *cert. denied*, 405 U.S. 955 (1972), and then extracted and applied the same principles as did this Court in *Jefferson Parish*.

This court in *Jefferson Parish* adopted a two market principle, cited at 1563, n.35, certain lower court opinions as consistent with that principle, and specifically cited the pages of *Chicken Delight* at 448 F.2d 48-49 where that opinion also employs a two market analysis.

The Seventh Circuit extensively discussed the principles of those two cases at 737 F.2d 703-705, where that court specifically refers to both *Jefferson Parish* and *Chicken Delight* at several points. The Seventh Circuit, therefore, discussed and applied the principles of *Jefferson Parish* by discussing and analyzing both *Jefferson Parish* and *Chicken Delight*.

There is nothing startling or devious about the Seventh Circuit's discussion. It does show that the Seventh Circuit did

not, as Walters charges, reject the tying doctrine, but accepted it and analyzed its application to this case.

Furthermore, the Seventh Circuit's decision did *not* conflict with *Jefferson Parish*. *Jefferson Parish* requires that, in order to decide whether two separate products exist, a determination be made whether there are two distinct product markets which have been linked so that, through power in the first, competition in the second distinct market has been foreclosed.

In *Jefferson Parish* a hospital's operating rooms and anesthesiological services were the alleged tying and tied items, respectively. They are rather obviously separate services. Indeed the Court of Appeals in that case noted in its opinion that "[t]he existence of a tying arrangement in this case has never been seriously disputed by appellee." *Hyde v. Jefferson Parish Hospital District No. 2*, 686 F.2d 286, 289 (5th Cir. 1982). The Supreme Court likewise recognized that anesthesiological services are in fact billed separately, are often selected separately, and can unquestionably be provided separately. 104 S.Ct. at 1563.

A product name, however, as the Seventh Circuit said in this case, is not an obviously separate product. A trademark is not a physical product or service but is usually simply the name of something else. As the Seventh Circuit points out, for instance, the name "Buick" is not something which a customer wants or needs or can use separately from a Buick car.

The Seventh Circuit did recognize, however, that, as in *Chicken Delight*, a separate market *may* exist for a name which does not identify a named product, but rather identifies a method of doing business in a prescribed format. (See also *Susser v. Carvel Corp.*, 332 F.2d 505 (2d Cir. 1964), *cert. dismissed* 381 U.S. 125 (1965), also cited in *Jefferson Parish*, 104 S.Ct. at 1563 n.35.) The problem in trademark tying cases is to identify a market (other than the market in which the physical product or service, the tied product, is sold) in which the trademark, the alleged tying product, is sold or marketed.

The trademark becomes a separate product in a separate and distinct market only if and when it is used as a separate product in that separate and distinct market by being bought and sold as something separate and distinct from the tied product.

The Seventh Circuit specifically recognized that a separate market for a trademark may exist and dealt specifically with that issue in this case. *Jack Walters, supra,* at 704-705. The Seventh Circuit also discussed at some length the very language from *Chicken Delight* which is found at 48-49 and was cited with approval by this Court.

On pages 48 and 49, the Ninth Circuit first enunciated the principle that a trademark may become a separate product if it is marketed separately from the product. *Chicken Delight* said consideration must be given to the function of a trademark and referred to the widespread commercial practice of franchising as having developed a new rationale for trademarks where the trademark identifies a method of doing business under a common trademark or tradename. The *Chicken Delight* court was referring to the fact that certain franchises or trademark licenses are bought and sold in a franchise market. This is true of franchises such as *Chicken Delight* or *Photovest* v. *Fotomat Corp.,* 606 F.2d 704, (7th Cir. 1979) *cert. denied* 445 U.S. 917 (1980). Those trademarks are bought and sold like commodities and there exists a separate, distinct market for those franchises.

Chicken Delight, of course, was a franchisor in the business of franchising, which licensed its several hundred franchisees to operate fast-food outlets under a uniform business format and under the Chicken Delight name. Carvel, too, was a food (ice cream) franchisor in the business of licensing 400 franchisees to operate their businesses in a prescribed format, with a prescribed appearance, and under the Carvel name.

Morton, in contrast to Chicken Delight, is not in the business of marketing franchises or trademark licenses. It never separately sold or licensed its name. Indeed, Morton insisted that Walters operate under its own name. Morton has never

even sought dealers and never in its history had more than six dealers. Throughout its history Morton has manufactured and sold Morton Buildings, not trademark licenses.

Neither the farmers who purchased Morton Buildings from Morton or from Walters, nor any of Morton's other dealers. purchased the Morton name as an item separate and apart from the building package. Certainly there would have been no reason for farmers to do so, and Walters, notwithstanding its present contention that it wanted to separate the Morton name from the Morton Building, never asked to purchase a separate license for the Morton name. The same is true of Morton's other dealers. Thus, from the perspective of Morton, its customers, or its dealers, there was no separate market for the Morton name.

Indeed, despite Walters' efforts to establish a custom of separate licensing in the pole building industry in general, the undisputed evidence is that there was no such custom. Of the 20 to 40 pole barn suppliers identified by Walters and its expert, Professor Mueller, only one (Bonanza) was identified as ever having sold its name separately from its buildings and it was different from Morton in other respects. In contrast, Jack Walters and Henry Getz, the presidents of Walters and of Morton, respectively, with their combined 50 years' experience in pole farm buildings, had never heard of the practice of licensing or selling the separate right to use a trademark or tradename.

Walters would require a manufacturer to separate the name of its product from the product itself any time someone else, *e.g.,* a dealer, believed it had a use for the name apart from the product and then allow that dealer to market the product of someone else under the manufacturer's name. This desire does not create a market for the name; it creates fraud. The undisputed facts show that no market for the Morton name exists separate and apart from the market for the "Morton Building".

Therefore, the Seventh Circuit in this case ignored neither the *Jefferson Parish* decision nor the "empirical facts." Accepting *Jefferson Parish*'s mandate that the determination be made whether separate markets exist for the alleged tying and tied products, it did examine the record to determine whether the name "Morton" is more like "Buick" or more like "Chicken Delight." Its conclusion is amply supported by the undisputed facts and accords with *Jefferson Parish*. Accordingly, there being no actual dispute over the governing legal principles, this case is not one that merits review by this Court.

In fact, Walters concedes (Pet. at 14) that, if Morton had obtained any building components it thought appropriate by any means it found appropriate; packaged them in any combination it thought best; and sold the resulting, disassembled aggregation at any price the market would bear as a "Morton Building," there would be no violation of §1 and neither Walters nor anyone else would have the right to buy the Morton name separately. Walters contends, however, that Morton in reality sold a free-standing structure which Walters, not Morton, erected. It is undisputed that Walters erected the building. Its erection function is simply not relevant to separate the Morton trademark from the building or building package which Morton sold to Walters and which was identified by the name Morton Building.

Regarding manufacturing itself, the Seventh Circuit examined the facts in the record and concluded that "the inference that Morton is really engaged in manufacturing buildings is inescapable." 737 F.2d at 705. Indeed, the inference is inescapable, for Morton's manufacturing and fabricating operations of cutting lumber, assembling trusses, and roll-forming steel alone accounted for 65% of Morton's direct cost of materials sold to Walters. But the point on a petition for certiorari is that, although Walters couches its argument in terms of failure to abide by Supreme Court precedent, its real point is not a dispute over law, but over the application of law to undisputed facts.

II.

THE SEVENTH CIRCUIT'S DECISION ON RESALE PRICE FIXING FOLLOWS SUPREME COURT PRECEDENT AND PRESENTS NO ISSUE WHICH MERITS SUPREME COURT REVIEW.

Accusing the Seventh Circuit of making a remarkable departure from existing law, Walters complains that the Seventh Circuit has created a "heretofore unknown exception to the rule against vertical price fixing", Pet. at 17, in order to avoid this Court's decision in *Albrecht v. Herald Co.*, 390 U.S. 145 (1968).

But the Seventh Circuit's discussion of the continuing validity of *Albrecht* is only *dictum*. The Seventh Circuit was simply stating that after *Sylvania* maximum resale price maintenance may be an open question. Such a statement is a candid reflection of this Court's own recognition that at some point it may be called upon to re-examine its prior resale price fixing decisions in light of *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977). See *Monsanto Co. v. Spray-Rite Service Corp.*, 104 S.Ct. 1464, 1469 n.7 (1984). Despite the *dictum*, the Seventh Circuit expressly stated, 737 F.2d at 707, that, as required by *Albrecht*, it was assuming maximum price fixing to be unlawful. Walters cited no other decisions of this Court with which it claims the Seventh Circuit's opinion conflicts. Since there is no conflict between the Seventh Circuit's decision and *Albrecht*, there is no significance to the decision which merits review in this Court.

Rather than ignore *Albrecht*, the Seventh Circuit assumed *Albrecht* was the law and considered several different approaches to Walters' resale price fixing claim. In considering these different approaches the Seventh Circuit considered all those facts which Walters claims were not mentioned in the Seventh Circuit opinion. Alleged policing, threats of termination, and other conduct were specifically discussed by the Seventh Circuit at various places in its opinion. These alleged

facts were simply not important because of other undisputed facts. On the basis of these other undisputed facts alone, the Seventh Circuit's decision is correct.

As Walters' amended complaint says, Morton is in the business of "selling and erecting" farm buildings and has its own sales office in Wisconsin through which it sells directly to farmers and other consumers. (Amended Complaint, ¶ 2, App. A-1 to A-2.) Morton periodically advertised special prices for certain of its buildings in a Wisconsin farmers' magazine. Morton offered to delete Walters' name from the ads, but Jim Walters testified that, even if the ad omitted Walters' name, farmers would want to purchase at the price seen in the ad. Walters in its brief filed in the district court admitted that "[s]ince the ads appeared within the territory served by Walters, as a practical matter, Walters had no choice but to charge the advertised special prices. It is obvious that any deviation from those prices would be met with intense customer resentment."

A manufacturer may advertise its prices directly to its consumers. (This unremarkable proposition was conceded by Walters.) The Seventh Circuit concluded that a distributor who feels compelled by anticipated pressure from its customers to meet those advertised prices has not suffered an antitrust injury. Walters cites no case from any court which contradicts this rather fundamental proposition. Indeed Walters could not cite any such case. This Court's decision in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), controls. Incidentally, the concurring opinion in the Seventh Circuit, 737 F.2d 713, relied exclusively on the *Brunswick* rationale. In *Brunswick*, this Court said at 489: "Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." (Emphasis in original.) The record establishes, and the Seventh Circuit properly concluded in this case, that, whether or not Morton had engaged in any

other conduct which was improper, Walters would have met the prices advertised and no compensable antitrust injury occurred.

At best, despite its dramatization of what the Seventh Circuit has done, Walters is quibbling with the Seventh Circuit's review of the summary judgment materials presented by both parties. There is nothing unusual about the legal issue presented by those materials. The Seventh circuit applied a settled proposition of law to the undisputed facts and did not create an issue worthy of review.

III.

WALTERS' ARGUMENT ON "AGGREGATION OF TRADE RESTRAINTS" SHOWS NO CONFLICT WITH SUPREME COURT PRECEDENT AND DOES NOT MERIT REVIEW.

On this issue, again Walters cites no Supreme Court decision with which the Seventh Circuit decision conflicts. Once again, therefore, there is nothing in Walters' claim or in the Seventh Circuit's decision which merits review by this Court.

Walters' first claim in its amended complaint charges Morton with tying, resale price fixing, and imposition of territorial restraints. Walters also claims that Morton's conduct was designed to drive Walters out of business and in the aggregate constituted a violation of §1 of the Sherman Act. The individual territorial claim was not at issue on the appeal and remains for trial in the district court. The Seventh Circuit properly rejected Walters' individual claims of tying and resale price fixing. Nevertheless, Walters attempts to resurrect those claims for trial under the guise of an "aggregation of trade restraints."

It has cited no Supreme Court authority for this attempt. Certainly, as the Seventh Circuit said, the phrase "aggregation of restraints" adds nothing to this case. The phrase first

appeared in *Timken Roller Bearing Co. v. United States,* 341 U.S. 593 (1951), to describe an agreement providing for horizontal territorial divisions, price fixing, and other practices intended to eliminate all competition among the parties to the agreement. The practices were in and of themselves unlawful *per se.* Similarly, in *United States v. Sealy, Inc.,* 388 U.S. 350 (1967), the phrase was used to describe a horizontal agreement among competitors for territorial division, a goal already declared by the Supreme Court with reference to the same defendants as *per se* unlawful.

Not only does it add nothing to call the alleged restraints an "aggregation", but where two of the three components of an alleged "aggregation" are not unlawful and the third remains for trial, it appears that, as the Seventh Circuit said at 737 F.2d 709, no other part of the alleged unlawful scheme remains.

The Seventh Circuit could have ended its discussion after concluding that the tying and resale price maintenance claims were not valid, but, instead, the court examined the case under the classic and broadest definition of a conspiracy, i.e. unlawful means to a lawful end or lawful means to an unlawful end. As the Seventh Circuit said, "This is a pretty encompassing definition, and if Walters cannot bring itself within either branch it is unlikely to have a cause of action under section 1." *Jack Walters & Sons, Corp., supra,* at 710. The court, therefore, was attempting to provide Walters the fullest opportunity for review.

The court then examined the two branches of the classic definition and concluded that, since (with the exception of territorial restraints) the means, i.e. resale price maintenance and tying, were not unlawful, an unlawful end must be found. The court then correctly concluded that the end, vertical integration or selling directly to farmers, was not itself unlawful.

Vertical integration is not only clearly lawful, as Walters concedes (Pet. at 21), but can be pro-competitive. In addition, as the Seventh Circuit noted, there is no monopoly here and

indeed none is alleged. Since the end was lawful and the means lawful, the Seventh Circuit properly concluded that the so-called aggregation of restraints claim must fail also.

Walters cites *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338 (3rd Cir. 1975), as its principal case on aggregation, but that case is certainly not a basis for granting certiorari. The Seventh Circuit opinion does not conflict with *Coleman*, but rather distinguishes *Coleman* because the means, *i.e.* predatory pricing, were unlawful. Thus, the Seventh Circuit was not in conflict with *Coleman*, but simply considered it inapplicable.

Another fatal flaw in the aggregation claim lies in Walters' conception of a conspiracy. The aggregation claim is a Section 1 claim and, without a conspiracy to do an antitrust injury *a la Brunswick, supra*, the claim must fail. In the Seventh Circuit, Walters emphasized its allegation that Morton sought vertical integration and claimed that Walters and Morton had agreed that Morton would destroy Walters. In this Court, even Walters has chosen not to pursue this self-destruction theory of conspiracy. The Seventh Circuit did not discuss such a nonsensical theory, but treated the aggregation claim more politely by discussing the application of the classic definition of conspiracy to vertical integration as an objective of a conspiracy.

For itself, Walters has now substituted in the conspiracy suppliers of some parts for the Morton Building. These suppliers were Walters' second-string and back-up conspirators in the Seventh Circuit, but have now been promoted to first-string.

The new team will not score either. Walters charged in a footnote in its brief in the district court "that Morton colluded with third party suppliers *to enforce its tie-in restraints*" (emphasis supplied), but did not claim that these suppliers conspired to drive Walters out of business. (The conclusion of the district court that the aggregation claim should be dismissed was based on the failure to allege participation by the suppliers in a broad predatory scheme. See Pet. App. p. 66. The

aggregation claim was called the predatory scheme in the Seventh Circuit and in the district court.) Even assuming, therefore, that the record would support a charge that Morton and certain suppliers agreed to require Walters to purchase all the materials, parts, and components for a Morton Building from Morton, that allegation does not charge a conspiracy to eliminate Walters. Those suppliers do not thereby become co-conspirators in the vertical integration plan or plan to destroy Walters. The suppliers are not even charged with the knowledge of "the essential nature and general scope" of Morton's supposed scheme, *H & B Equipment Co., Inc. v. International Harvester Co.*, 577 F. 2d 239, 245 (5th Cir. 1978). Morton and its suppliers therefore could not have had a "meeting of minds" on the scheme, *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946), and there was no conspiracy.

Furthermore, no conspiracy would exist even if there were a tie-in arrangement. In *Harold Friedman, Inc. v. Kroger Co.*, 581 F.2d 1068 (3rd Cir. 1978), the plaintiff failed to meet the §1 requirement of concerted activity and the court affirmed summary judgment for the defendant. Relying on *Albrecht v. Herald Co., supra,* the court stated that "the party combining with the defendant must have knowledge of the defendant's anticompetitive purpose." *Id.* at 1074. Walters has not even alleged the requisite joint purpose in this case.

Finally, this Court has recently set forth a definition of conspiracy under section 1, stating in *Monsanto Co. v. Spray-Rite Service Corp.*, 104 S.Ct. 1464, 1471 (1984), "that the manufacturer and others 'had a *conscious* commitment to a *common scheme* designed to achieve an unlawful objective'". (Emphasis supplied.) There is nothing in the record to support an allegation (and none has been made) that any suppliers of any of the parts for the Morton Building *consciously committed themselves to a common scheme with Morton to eleminate Walters as a dealer or competitor.*

If, as the Seventh Circuit and the district court concluded, there was no tie-in, then Walters' position becomes even more absurd. With no tie-in, accepting Walters' view means that the suppliers would be antitrust co-conspirators, guilty of participating in a broad-scale conspiracy to destroy Walters, even though the only conduct of which the suppliers had knowledge or in which they participated, *i.e.* preventing Walters from obtaining supplies with which it could have passed off a non-Morton building as a Morton Building, did not violate the antitrust laws.

As this Court has recognized, the antitrust laws are designed for the protection of competition, not an individual competitor. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., supra.* The court in *Coleman, supra,* also stated that damage to an individual's business can not constitute a restraint of trade under §1 even if a combination or conspiracy exists. "An injury to competition in the marketplace" is necessary for a restraint of trade. 525 F.2d at 1346.

Walters' aggregation claim is nothing more than a complaint that Walters was treated poorly by Morton. Walters' opposition to Morton's summary judgment motion was based not on an effect on competition, but on an effect on itself. Indeed, regarding competition, as the Seventh Circuit noted, Walters' whole tie-in claim is premised on the ready availability from other manufacturers of the components which Morton supplies in kit form. In this case, not only was Walters not destroyed as a potential competitor of Morton's, but it survived and prospered as a manufacturer and seller of "Walters Buildings". Since the antitrust laws should not be used to provide treble damage remedies for private state suits masquerading as antitrust actions, *Copperweld Corp. v. Independence Tube Corp.*, 104 S.Ct. 2731, 2745 (1984) and Walters' aggregation claim is nothing more than an effort to achieve that result, it was properly rejected by the court below.

CONCLUSION

Walters' petition insinuates that the author of the Seventh Circuit's opinion is a foe of much or all of current antitrust law and that he managed to impose his views on the panel. This Court will note, of course, that the decision upholding summary judgment for Morton was affirmed by vote of the entire panel and that one judge wrote a separate concurrence which used even stronger language to condemn the tying and resale price fixing claims. The concurrence does not question the grounds upon which the decision rests, but simply points out that there are *dicta* in the opinion which are of peripheral relevance to the matters raised in that court.

Walters' petition at best constitutes a quarrel with certain of the *dicta* in the Seventh Circuit's opinion but those *dicta* are not appropriate topics for Supreme Court review. The decision itself rests upon correct legal grounds and reflects a regard for applicable Supreme Court precedent. Accordingly, Morton respectfully requests that Walters' petition for a writ of certiorari be denied.

Respectfully submitted this 15th day of October, 1984.

RICKARD T. O'NEIL
Counsel of Record
SUSAN R. ROBERTSON
MICHAEL, BEST & FRIEDRICH
250 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
(414) 271-6560

MYRON L. CAUBLE, JR.
5415 North Idlewild Avenue
Milwaukee, Wisconsin 53217
(414) 332-9542
Attorneys for Respondent
Morton Buildings, Inc.

APPENDIX A

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United States District Court for the Eastern District of Wisconsin

JACK WALTERS & SONS. CORP., *Plaintiff,* -vs- MORTON BUILDINGS, INC., *Defendant.*	Amended Complaint Civil Action No. 78-C-329

Plaintiff, Jack Walters & Sons, Corp. ("Walters"), by its attorneys, David E. Beckwith, John S. Skilton, Michael G. Laskis and Michael A. Bowen, for its amended complaint against the defendant, alleges and shows as follows:

THE PARTIES

1. Walters is a Wisconsin corporation with its principal office in Allenton, Wisconsin. Since approximately 1962, Walters has been engaged in the business of selling farm and commercial buildings. Throughout said period up until approximately January 9, 1978, Walters operated as a dealer of buildings assembled with materials, parts and components sold to it by Morton Buildings, Inc. ("Morton"), the defendant herein.

2. Upon information and belief, Morton is an Illinois corporation with its principal place of business located at 252 West Adams Street, Morton, Illinois 61550. Morton is engaged in the business of selling and erecting farm, commercial and industrial buildings in at least 18 states, including Illinois, Wisconsin, Ohio, Michigan, Iowa, Minnesota, Kentucky, Indiana, Nebraska, North Dakota, South Dakota, New York, Pennsylvania, Colorado, Kansas, Missouri, Texas and Oklahoma. In addition to at least 70 other locations, Morton owns

and operates sales offices located in Dodgeville, Wisconsin and Elkhorn, Wisconsin, and, through these offices sells directly in southern Wisconsin. Morton is engaged in substantial and not isolated business activities in the State of Wisconsin.

JURISDICTION AND VENUE

3. This action is instituted, the amended complaint herein is filed and jurisdiction of this Court is invoked under and pursuant to Sections 4 and 16 of the Clayton Act (15 U.S.C. Sections 15 and 26) to recover threefold the damages sustained by plaintiff for injury to its business and property by reason of the defendant's violations of Section 1 of the Sherman Act (15 U.S.C. Section 1) and Section 3 of the Clayton Antitrust Act (15 U.S.C. Section 14). Plaintiff also requests injunctive relief against defendant's continuing violations of the Antitrust Laws, and to recover its cost of suit, including reasonable attorneys' fees. Plaintiff also seeks injunctive relief from plaintiff's intent to wrongfully terminate plaintiff's dealership under Section 16 of the Clayton Act and Chapter 135, Wis. Stats. (the "Wisconsin Fair Dealership Law").

4. This Court has jurisdiction of the subject matter of this action under Section 1337 of Title 28 of the United States Code because this action arises under acts of Congress regulating commerce and protecting trade and commerce against restraints and monopolies, under Section 1332(a) of Title 28 of the United States Code because this action is between citizens of different states and because the amount in dispute exceeds the sum of $10,000 exclusive of interest and costs, and pursuant to principles of pendent jurisdiction.

5. This Court has jurisdiction over the person of the defendant because the action arises from acts of the defendant within this district and the defendant is doing business and may be found in this district.

6. This action is properly venued in this Court because the claims asserted by plaintiff arose in the Eastern District of Wisconsin and the defendant is found and transacts business within the Eastern District of Wisconsin.

BACKGROUND ALLEGATIONS

7. Since at least 1960, Morton has marketed and sold, under the Morton name, trademarks and logos, materials, parts and components which are assembled as complete buildings for farm, commercial and industrial use ("Morton buildings"). The ultimate purchasers of said buildings are usually farmers; said buildings are normally used, *e.g.*, for storage or animal shelter.

8. A typical Morton building is a basic clear span pole building with steel siding and roof. Morton buildings range in size from a basic 14×21 building to buildings of up to 81 feet in width, clear span, with lengths of up to 500 feet. Materials, parts and components include treated wood posts or poles, dry cement, dimension lumber (*i.e.*, "nailers" (common 2×6 boards), "purlins" (common 2×4 boards), and "splash boards" (treated 2×8 boards)), common nails, hardware, steel sheets (for siding and roofing), roof trusses, insulation, window frames, windows, door tracks, and doors, and such other accessories as the customer may order. Morton Buildings, while they are not unique, and, upon information and belief, have no patented or other other legally protected unique characteristics, do have market acceptance by reason of advertising, marketing, and the quality of the materials used and of their erection and construction.

9. Since at least 1962, Morton has not only marketed and sold its buildings by and through its own sales offices, but has also sold to independent dealers for resale. In approximately 1962, Walters became such an authorized independent dealer

of Morton buildings and has remained as such to this date. On or about June 1, 1974, there were five authorized independent dealers of Morton buildings: Walters, Chandler Company, Morton Buildings of Michigan, Inc., Daugherty Sales and Service, and Morton Midstates Builders.

10. Since 1962, and particularly, during the period of June 1, 1974 to date, Morton has become and now is the most successful seller in the United States of buildings of the type described in paragraph 8. Concomitantly, the Morton name has become the dominant name in the industry. Upon information and belief, as of this date there are four major competitors in the sale of farm buildings of said type, the combined sales of which do not equal the sales of Morton alone. Upon information and belief, in 1974 Morton's gross sales of said buildings exceeded $80 million.

11. Since 1962, and, particularly, since 1974, the Morton name, trademarks and logos have acquired substantial goodwill and trade value, particularly in reference to the kind of buildings described in paragraph 8. Such value was obtained as the result of the high quality and good performance of Morton buildings, and by and through the successful selling and marketing efforts of Morton and its independent dealers.

12. The business of Walters as a Morton dealer consists of selling Morton buildings to farmers and other customers, and then purchasing from Morton all of the materials and components required to construct the building. Among the materials purchased are such basic commodities as lumber, nails, insulation and sheet metal. Certain of the components purchased from Morton have been designed by Morton and are fabricated by Morton from commonly available materials. All of the items which Walters purchases from Morton could, with no difficulty, be specified so that Walters could purchase items of identical quality and characteristics from local or other wholesale sources at prices substantially less than those charged

by Morton. Those components which Morton does fabricate, Walters could as well fabricate from readily available materials which could be specified by Morton with no depreciation in the quality of the fabricated components. Walters' business also involves ordering all of the components required for a customer's building from Morton and then, with its crews, erecting the customer's building on its premises from the components in accordance with directions and instructions which Morton has conveyed to Walters over the years. Because of its extensive experience in the sale and erection of Morton buildings, Walters at this time is fully qualified to erect such buildings without special assistance or direction from Morton.

13. Since 1962, and, particularly, since 1974, the Morton name, trademarks and logos have acquired substantial value in the State of Wisconsin, particularly in reference to the kind of buildings described in paragraph 8. Such value has been established in large part by and through the selling, marketing, construction, design and service efforts of Walters. As a result, the right to use the Morton name, trademarks and logos is now, and has been since 1974 and before, an important and valuable asset of Walters.

14. Prior to 1974, Walters operated profitably as a Morton dealer. For Walters' fiscal years 1974 and 1975 its gross sales of Morton buildings substantially exceeded $4 million; gross sales for the fiscal year 1976 exceeded $5 million; gross sales for the fiscal year 1977 exceeded $6 million. However, as the result of the unlawful actions of Morton herein complained of, Walters' profit on such sales since 1974 has been substantially reduced; indeed as the direct and proximate result of those actions, in the fiscal year 1977 Walters sustained a loss on such sales, even though they were the highest in its history.

FIRST CLAIM

(For Treble Damages Under The Antitrust Laws)

15. From the beginning of Walters' relationship with Morton, Morton has required Walters, as a condition of retaining its dealership and of maintaining its right to use the Morton name, trademarks and logos, to purchase all materials, parts and components of Morton buildings from Morton and Morton alone, even though such materials, parts and components generally were and are common items which could otherwise have been purchased and acquired by Walters at local lumber yards or other sources of supply at prices significantly less than those charged by Morton, and even though Morton itself did not manufacture or produce most of such items but rather purchased them from other sources of supply. Such common items included the treated wood posts or poles, dry cement, nailers, purlins, splash boards, nails, hardware, insulation, window frames, windows, door tracks and doors. In addition, Morton required Walters to purchase all trusses and steel sheets from Morton, and Morton alone, even though such components could be manufactured by Walters or others at prices substantially less than those charged by Morton.

16. From at least 1970 on, and continuing through this date, Walters has made repeated requests of Morton that Walters be permitted to purchase some or all of the materials, parts and components used in the buildings which it erected directly from sources of supply other than Morton. Such requests were made because of Walters' knowledge that the prices which it was being charged by Morton for such materials, parts and components were substantially higher than the prices which Walters could obtain from other sources for identical and/or fully interchangeable materials, parts and components. In each such instance, Morton denied such request; further, Morton threatened to terminate Walters' dealership, to discontinue doing business with Walters, and to raise prices on

other parts, and thus to prevent Walters from using the Morton name, trademarks and logos, should Walters seek to obtain or obtain any materials, parts or components from any source other than Morton. In addition, in order to enforce its unlawful policy, Morton policed the buying activities of Walters, *e.g.*, by causing its employees to inspect Walters' inventories and by requiring Walters to submit forms and to submit to various ordering procedures designed to detect and prevent purchases by Walters from any source of supply other than Morton. The aforesaid unlawful and coercive actions continued through the date of the original complaint herein and resulted in Walters' decisions to refrain from purchasing materials, parts and components from sources other than Morton.

17. Because the inflated prices charged by Morton from 1970 to date, Walters made efforts to acquire the common materials, parts and/or components directly from Morton's own suppliers. In particular, Walters sought to acquire materials, parts and components not unique to Morton such as insulation from Celotex Corp.; overhead doors from Frantz Manufacturing Co.; windows from Luedtke Mfg. & Dist. Co., Inc.; poles from Kopper's Co.; doors from Ceco Corporation; door tracks from National Mfg. Co.; nails from Maze Nails; ventilation equipment from Aerovent Corporation; and pest controls from Rid-a-Bird Corporation. Some of such contracts occurred between the dates of June 1, 1974 and the date of the original complaint herein. In each instance, respectively, Morton's supplier refused to deal with Walters, because, upon information and belief, Morton had informed it (the supplier) that should it do business with Walters (or any other dealer), Morton would not do business with it (the supplier). As a result of such unlawful refusals to deal, conspiracies and boycotts, Walters was unable to obtain any of the aforesaid items from any of Morton's suppliers, respectively.

18. From the beginning of its relationship with Morton, and, particularly, from June 1, 1974 through the date of the original complaint herein, Morton imposed territorial restrictions on the selling activities of Walters. In this regard, Morton, by threats, intimidation, and policing activities, sought to prevent and prevented Walters from selling in any area outside of its assigned territory despite Walters' repeated requests to sell in other areas, including, without limitation, throughout the State of Wisconsin, and in areas of Iowa, Minnesota and upper Michigan. As a result of said unlawful restrictions, Walters was prevented from making substantial sales of Morton buildings outside of its assigned territories.

18(a). From at least June 1, 1974 through June 1, 1978, Morton enforced and imposed various coercive policies, requirements and restrictions upon Walters (and other independent dealers) with the purpose and effect of eliminating or reducing intrabrand competition between independent dealers such as Walters and Morton in the sale of Morton buildings and of controlling and maintaining the retail sales price charged by Walters (and other independent dealers) for Morton buildings. Such policies, requirements and restrictions included the following:

(a) directly controlling and setting the retail price of the majority of buildings sold by Walters by advertising the retail sales price for Morton buildings ("advertised specials") within the territory in which Walters was permitted to sell its buildings;

(b) enforcing territorial restrictions and restraints upon Walters (and other independent dealers), reducing the territory in which Walters was permitted to sell, and preventing Walters from acquiring additional territory in order to prevent Walters from competing with Morton's own sales outlets; and

(c) increasing the cost to Walters of materials, parts and components while simultaneously imposing policies and requirements that prevented Walters (and other inde-

pendent dealers) from purchasing materials, parts and components from any source other than Morton, thus requiring Walters and other dealers to charge the customer an unnecessarily high and artificially inflated price.

19. Since 1970, Morton, either because it wished to eliminate its dealers and sell directly but did not wish to pay full value for the dealers' businesses, or in order to enforce its anticompetitive practices and restraints of trade:

(a) increased the cost of the materials, parts and components of its buildings to its dealers, including Walters (and to its sales outlets) for the stated purpose of "maximizing" factory profitability but, upon information and belief, for the real purpose of making it unprofitable to operate as an independent Morton dealer;

(b) continued to enforce its policy that no dealer, including Walters, purchase any materials, parts or components, from any source other than Morton; and

(c) arbitrarily charged dealers, including Walters, for portions of Morton's administrative costs and expenses even though such dealers did not benefit in any way from the services covered by such charges, and, indeed were providing such services for their own operations at their own expense.

Upon information and belief, as the result of the aforesaid acts and practices Morton substantially reduced the profit margins of independent dealers, including Walters, resulting by 1977 in the elimination of every independent dealer except Walters. Upon information and belief, each of the other dealers was driven out of the business because of the afore-described unlawful activities of Morton, and was forced to sell its business to Morton at a disadvantageous price.

20. The afore-described policies, activities, conspiratorial conduct, agreements, understandings, and actions of Morton, separately and in combination, constitute an unreasonable and unlawful restraint of trade and commerce in and among the

several states, and have substantially reduced, and continue to substantially reduce, competition in a not insignificant and not insubstantial manner and amount, and have resulted in injury to the public, as well as to the business of Walters.

21. The afore-described policies, activities, conspiratorial conduct, agreements, understandings and actions of Morton, separately and in combination, violated the Antitrust Laws of the United States, and, in particular, Section 1 of the Sherman Act and Section 3 of the Clayton Act.

22. As a result of the aforesaid violations, Walters, from June 1, 1974 through the date of this complaint, has sustained injuries and damages to its business and property in an amount of at least Two Million Seven Hundred Fifty Thousand Dollars ($2,750,000.00).

SECOND CLAIM

(For Damages For Termination Violation of the Wisconsin Fair Dealership Law)

As and for its second claim against the defendant, plaintiff alleges and shows as follows:

23. Repeats and realleges, as though fully set forth herein, each and every allegation of paragraphs 1-22, above.

24. Since at least June 1, 1974, Walters has been a "dealer" in Morton buildings within the meaning of Section 135.02(5), Wis. Stats.

25. Since at least June 1, 1974, Morton has been a "grantor" within the meaning of Section 135.02(3), Wis. Stats.

26. Since at least June 1, 1974, there has been a "dealership" agreement between Morton and Walters within the meaning of Section 135.02(2), Wis. Stats.

27. On October 14, 1977, authorized representatives of Morton and Walters met to discuss the adverse effects of

Morton's unlawful policies, activities, conspiratorial conduct, agreements, understandings and actions on the business of Walters. At such time, Walters again requested Morton to reduce the price of materials, parts and components, and/or to permit Walters to obtain such materials, parts and/or components from other sources. Once again Morton refused such requests and threatened Walters with termination should it seek and obtain such other sources of supply.

28. After said October 14, 1977 meeting Walters was put to the choice of seeking other sources of supply for materials, parts and/or components of its buildings or going out of business. Walters chose to stay in business by locating and developing other sources of supply. By letter dated January 9, 1977, attached hereto as Exhibit A, Walters informed Morton of this decision.

29. By letter dated February 17, 1978, a copy of which is attached hereto as Exhibit B, Morton informed Walters that "as of June 1, 1978, Morton Buildings, Inc., is terminating its dealership arrangement with Jack Walters and Sons, Corp." Said letter does not comply with the requirements of Section 135.04, Wis. Stats., and, accordingly, does not constitute a lawful or proper notice of termination.

30. Walters' dealership was terminated by Morton. Morton lacked "good cause" within the meaning of Section 135.03, Wis. Stats., for termination of Walters. Upon information and belief, Morton's "cause" for terminating Walters was grounded in continuing efforts to violate the Antitrust Laws to the injury of Walters, as more fully alleged in plaintiff's First Claim.

31. Said termination followed and was indirectly accomplished by and through Morton's imposition and enforcement of the aforedescribed policies, requirements, restrictions, agreements and understandings, separately and in combination, which had severely damaged and ultimately destroyed Walters' ability to operate profitably as a Morton dealer, which had

rendered Walters' Morton dealership valueless, and which had forced Walters to commence selling its own line of buildings.

32. Morton's termination of Walters' dealership was in violation of the Wisconsin Fair Dealership Law.

33. By reason of the aforesaid violations, Walters has been damaged in an amount which has not yet been fully determined, but which is capable of ascertainment to a reasonable degree of legal certainty, and which includes the start-up and additional marketing and advertising costs which Walters has been forced to incur in order to maintain itself in business after Morton's unlawful termination of its dealership.

THIRD CLAIM

(For Treble Damages For Termination in Violation of Section 1 of the Sherman Act and Section 3 of the Clayton Act)

34. Repeats and realleges, as though fully set forth herein, each and every allegation of paragraphs 1-22, 27-31 and 33 above.

35. Morton's termination of Walters' dealership was in violation of Section 1 of the Sherman Antitrust Act, and Section 3 of the Clayton Antitrust Act.

FOURTH CLAIM

36. Repeats and realleges as though fully set forth herein, each and every allegation set forth in paragraphs 1-22 and 27-29, above.

37. During the period from at least June 1, 1974 to February 17, 1978, Morton, by virtue of the contractual and in fact dealership relationship which existed between itself and Walters, through which relationship Morton required Walters, as an exclusive Morton dealer, *inter alia,* to use its best efforts to

promote and sell and erect Morton buildings, and also the public policy of the State of Wisconsin, *e.g.,* as declared in the Wisconsin Fair Dealership Law, owed Walters a duty of good faith and fair dealing which duty included the duty to permit Walters a fair opportunity to make a reasonable profit and return on its own sales of Morton buildings. Throughout said period, Morton possessed and exercised a dominant economic power and position over Walters which Morton obtained and maintained by and through its ownership of and control over its name, trademark and logo, in combination with Walters' known and expressed desire to retain its Morton dealership and its right to use the Morton name, trademarks and logos which Walters had promoted and developed in the State of Wisconsin since approximately 1962.

38. Throughout said period Walters in good faith exercised its best efforts to promote, sell and erect Morton buildings as a Morton dealer.

39. From at least June 1, 1974, and thereafter, Morton misused and abused its dominant economic power and position over Walters, and breached its duty of good faith and fair dealing to Walters, by:

(a) charging unfair, unreasonable and exorbitant prices for materials, parts and components;

(b) requiring and coercing Walters to purchase all materials, parts and components from it;

(c) reducing the discounts available to, and thus the profit margin available to, Walters on purchases of materials, parts and components;

(d) preventing Walters from selling Morton buildings outside of its designated territory;

(e) reducing the territory in which Walters was permitted to sell Morton buildings; and

(f) preventing Walters from acquiring additional territory.

40. Upon information and belief, the purpose and intent, as well as the effect and result, of the scheme alleged in paragraph 39, and each and every constituent part, was not only to restrain trade and prevent Walters from competing with Morton's own sales offices, but also to limit and ultimately to destroy the profitability of Walters' dealership and thus to terminate Walters' dealership and concomitantly to eliminate Walters as a potential or future competitor of Morton.

41. The scheme alleged in paragraph 39, including its constituent acts, policies, practices, predatory conduct and changes in competitive circumstances was oppressive, was undertaken in a disguised, secretive and deceitful fashion in order to conceal its purposes and effects from Walters, and violated Morton's duty of good faith and fair dealing to Walters, as well as Section 1 of the Sherman Act and Section 3 of the Clayton Act and the Wisconsin Fair Dealership Law.

42. The scheme alleged in paragraph 39, separately and in combination, intentionally, unfairly, unjustifiably, inequitably and unlawfully: (a) overcharged Walters for common materials, parts and components; (b) thwarted and restricted Walters' ability to operate profitably; (c) confiscated and converted to Morton Walters' just share of profits and returns on its sales of Morton buildings; (d) confiscated and ultimately destroyed the value of Walters' Morton dealership; and (e) forced Walters to commence selling its own line of buildings.

43. As the result of the aforesaid scheme, violations, breaches of duty, unfair, predatory and unlawful conduct, acts, practices and changes, as above alleged, Walters sustained injuries and damages to its business and property in an amount of at least Two Million Seven Hundred and Fifty Thousand Dollars ($2,750,000.00).

44. Upon information and belief, the aforesaid scheme, and its constituent acts, policies, practices, predatory conduct and changes in competitive circumstances, was undertaken in

bad faith, wilfully, wantonly and maliciously, and accordingly plaintiff is entitled to punitive damages in such amount as the trier of fact may assess.

FIFTH CLAIM

45. Repeats and realleges, as though fully set forth herein, each and every allegation set forth in paragraphs 1-22, 27-29 and 37-39, above.

46. Since on or about February 17, 1978, defendant Morton Buildings, Inc. has unfairly competed with Walters. Overt acts of unfair competition have included, but have not been limited to, contact, solicitation and hiring of key, trained employees of Walters for Morton's Wisconsin sales offices. In this regard, Morton has contacted Walters' employees on numerous occasions, has offered such employees pay and benefits higher than those provided by Morton to its employees generally, and has falsely disparaged the financial standing, condition and prospects of Walters.

47. As a result of the unlawful and unfair conduct described in paragraph 46, Morton has succeeded in hiring several of Walters' employees.

48. The aforesaid conduct has been deliberately directed at Walters as distinct from other competitors of Morton. Upon information and belief, Morton has engaged in the aforesaid conduct for the purpose of limiting and ultimately destroying Walters' ability to compete with Morton in the market. Upon information and belief, the aforesaid conduct was motivated in material part by ill-will and malice toward Walters and as part of Morton's intent and continuing efforts to destroy Walters as a competitor of Morton.

49. As a result of the aforesaid conduct, Walters has been injured in an amount which has not yet been fully determined.

but which is capable of ascertainment to a reasonable degree of legal certainty.

50. If the aforesaid acts or acts similar in kind, are not ceased, restrained or enjoined, Walters will suffer irreparable injury and harm.

WHEREFORE, Walters prays for judgment against defendant as follows:

1. Declaring that the above-alleged policies, activities, conduct, agreements, understandings and actions of Morton are unlawful and in violation of Section 1 of the Sherman Antitrust Act and Section 3 of the Clayton Antitrust Act.

2. Awarding judgment to Walters and against Morton for an amount equal to threefold the damages sustained by plaintiff as a result of defendant's violations of Section 1 of the Sherman Antitrust Act and Section 3 of the Clayton Antitrust Act, as alleged in the First and Third Claims.

3. Awarding judgment to Walters and against Morton for the damages sustained by Walters as the result of Morton's unlawful termination of plaintiff's dealership as alleged in the Second Claim.

4. Awarding judgment to Walters and against Morton for the damages sustained by Walters as the result of the acts, policies, practices, predatory conduct and changes in competitive circumstances alleged in the Fourth Claim, as well as punitive damages.

5. Awarding judgment to Walters and against Morton for the damages sustained by Walters as the result of Morton's unfair and unlawful conduct as alleged in the Fifth Claim and permanently enjoining Morton from any such further conduct.

6. Awarding judgment to Walters and against Morton for Walters' costs of suit, including reasonable attorneys' fees.

DAVID E. BECKWITH
JOHN S. SKILTON
MICHAEL G. LASKIS
MICHAEL A. BOWEN

By_____
Attorneys for Plaintiff
Jack Walters & Sons, Corp.

Of Counsel:

FOLEY & LARDNER
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
414-271-2400

PLAINTIFF HEREBY REASSERTS
ITS DEMAND FOR TRIAL BY JURY